

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNIVERSITY OF PITTSBURGH,

Plaintiff,

V.

VARIAN MEDICAL SYSTEMS, INC.,

Defendant.

ELECTRONICALLY FILED

Civil Action No. 2:07-cv-00491-AJS

Judge Arthur Schwab

**DEFENDANT VARIAN MEDICAL SYSTEMS'
MOTION FOR CONTEMPT SANCTIONS**

INTRODUCTION

Defendant Varian Medical Systems (“Varian”) requests that this Court grant Varian’s Motion for Contempt Sanctions against Plaintiff University of Pittsburgh (“UPitt”).

On March 20, 2008, this Court issued an order (“Order”) requesting that both Varian and UPitt appear for a Status / Settlement conference (“Conference”) on March 28, 2008. The Order explicitly required that the parties’ chief trial counsel and chief business decisionmakers attend in person and be prepared to discuss settlement and other options. This Court further ordered that the parties submit brief confidential letters and proposed settlement agreements to the Court prior to the Conference. Varian fully complied with the Order, but UPitt did not:

- UPitt did not submit a proposed settlement agreement;
 - UPitt’s chief business decisionmaker did not attend the Conference in person;
 - UPitt failed to provide any “plausible justifications” for its behavior; and
 - UPitt did not petition the Court prior to the Conference to excuse it from complying with the Order.

Based on these violations, this Court found UPitt in contempt of the Order and stated that Varian could file an appropriate motion for sanctions. Varian hereby seeks sanctions in the form of an order granting Varian reimbursement for its costs incurred to prepare for and attend the

1 Conference, and attorneys' fees incurred to prepare the instant Motion. The total amount
 2 requested is \$30,024.43.

3 **I. THE COURT SHOULD GRANT VARIAN'S MOTION FOR CONTEMPT
 SANCTIONS BECAUSE PLAINTIFF HAS FAILED TO COMPLY WITH A
 SPECIFIC AND DEFINITE COURT ORDER**

5 "A court of the United States shall have power to punish by fine or imprisonment, or both,
 6 at its discretion, such contempt of its authority, and none other, as--(3) Disobedience or resistance
 7 to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(3). Civil contempt
 8 "vindicates the District Court's authority over a recalcitrant litigant." *Hutto v. Finney*, 437 U.S.
 9 678, 691 (1978). Civil contempt may be employed to coerce the violator into compliance with
 10 the court's order and to compensate for losses sustained by the disobedience. *McDonald's Corp.*
 11 *v. Victory Investments*, 727 F.2d 82, 87 (3d Cir. 1984). Federal law governs a motion for civil
 12 contempt of a federal order. *Roe v. Operation Rescue*, 919 F.2d 857, 869 n.11 (3d Cir. 1990).

13 Civil contempt is committed when a person violates an order of court which requires that
 14 person in specific and definite language to do or refrain from doing an act or series of acts.
 15 *Lichtenstein v. Lichtenstein*, 425 F.2d 1111, 1113 (3d Cir. 1970). To find contempt, it must be
 16 established, by clear and convincing evidence, that there existed a valid order of the Court of
 17 which UPitt had knowledge and which UPitt disobeyed. *Robin Woods Inc. v. Woods*, 28 F.3d
 18 396, 399 (3d Cir. 1994); *Buschmeier v. G&G Investments, Inc.*, No. 02:03-MC-00506, 2005 U.S.
 19 Dist. LEXIS 23009, at *1 (W.D. Pa. 2005); *Square D Co. v. Scott Elec. Co.*, 2007 U.S. Dist.
 20 LEXIS 84297, at *15 (W.D. Pa. 2007). "[W]illfulness is not a necessary element of civil
 21 contempt" and "[g]ood faith is not a defense to civil contempt." *Robin Woods Inc.*, 28 F.3d at
 22 399. Moreover, the Third Circuit has not recognized substantial compliance as a defense to civil
 23 contempt. *Id.*.

24 There is no doubt that a valid court order with specific and definite language was issued
 25 on March 20, 2008, when this Court ordered both Varian and UPitt to appear for the Conference
 26 on March 28, 2008. See Docket No. 262, at 1. The order explicitly states that "[c]hief trial
 27 counsel and chief business decisionmakers shall attend in person and be prepared to discuss case
 28 schedule, settlement, and further alternative dispute resolution options in detail." *Id.* This Court

1 further ordered that each party submit a brief confidential letter and a proposed settlement
 2 agreement to the Court by noon on March 26, 2008. *Id.*

3 Varian fully complied with the Court's order. *See Docket No. 282, at 2.* A person with
 4 full authority to settle on Varian's behalf, Keith Askoff, appeared with lead trial counsel William
 5 Anthony, as well as counsel Henry Sneath and Shannon Clougherty. *Id.*, at 1. Varian also
 6 submitted a confidential letter and a proposed settlement agreement to the Court by noon on
 7 March 26, 2008. *See Sneath Decl. at ¶3.*

8 There is also no doubt that UPitt knew of this order. All parties receive electronic notice
 9 of any order from the Court. In addition, UPitt's lead trial counsel, Dan Johnson, contacted Mr.
 10 Sneath on March 20, 2008 and asked Mr. Sneath whether Varian would joint in a request to the
 11 Court to postpone the Conference. *See Sneath Decl. at ¶2.* In a subsequent phone call, Mr.
 12 Sneath informed Mr. Johnson that Varian rejected UPitt's request and would appear at the
 13 Conference as scheduled. *Id.*. Moreover, during the conference in front of the Court, Mr.
 14 Johnson did not deny that he and his client knew of the order, nor did he provide any "plausible
 15 justifications" for UPitt's non-compliance. *See Docket No. 282 at 2.*

16 Not only did UPitt fail to submit a proposed settlement agreement to the Court, its chief
 17 business decisionmaker, Mr. Cochran, failed to attend the Conference in person. *See Docket No.*
 18 282, at 1-2. These failures interfered with the parties' ability to conduct meaningful settlement
 19 discussions and the Court's ability to assist the parties in that endeavor. In addition, UPitt failed
 20 to petition the Court ahead of time to excuse it from complying with the Order. *Id.*, at 2.

21 For the above reasons, this Court should grant Varian's Motion and find UPitt in contempt
 22 of this Court's order.

23 **II. THE COURT SHOULD ORDER UPITT TO COMPENSATE VARIAN FOR THE
 24 FEES AND EXPENSES IT INCURRED TO PREPARE FOR AND ATTEND THE
 25 CONFERENCE AND PREPARE THE INSTANT MOTION**

26 Sanctions for civil contempt serve two purposes: to coerce the non-compliant party into
 27 compliance with the court's order and to compensate for losses sustained as a result of the
 28 disobedience. *Robin Woods Inc.*, 28 F.3d at 400. The relief granted often "takes the form of a
 fine in the amount of the damages sustained by a petitioner and an award of costs and attorney's

1 fees.” *Quinter v. Volkswagen of America*, 676 F.2d 969, 975 (3d Cir. 1982); *Square D Co.*, 2007
2 U.S. Dist. LEXIS 84297, at *21-*22.

3 Varian expended considerable resources to prepare for and attend the Conference. Mr.
4 Askoff traveled from California to Pittsburgh for the Conference, and Mr. Anthony traveled from
5 the East Coast to Pittsburgh on his way back to California. The travel expenses for Mr. Askoff
6 are \$1253.94 and for Mr. Anthony are \$1689.04. *See* Askoff Decl. at ¶4; Poppe Decl. at ¶5.

7 In addition to the travel expenses, Varian incurred significant attorneys’ fees to prepare
8 for the Conference. Attorneys William Anthony, Matthew Poppe, Henry Sneath, Zheng Liu,
9 Shannon Clougherty, and Bridgette Ahn participated in formulating strategy, drafting and
10 revising the lengthy confidential letter and proposed settlement agreement, and engaging in other
11 preparations for the Conference. Mr. Anthony, Mr. Sneath, and Ms. Clougherty attended the
12 conference with Mr. Askoff. The total attorney fees for these activities amount to \$21,782.45.
13 *See* Poppe Decl. at ¶¶2-4, 6-7; Sneath Decl. at ¶¶4-5.

14 It is also appropriate to award Varian the attorneys’ fees it incurred in connection with
15 preparing the instant Motion. “A successful party proving contempt is entitled to recover, by way
16 of civil fine, the expense of investigating the violation of the order and preparing for and
17 conducting the contempt proceeding, in addition to attorneys’ fees.” *Robin Woods Inc.*, 28 F.3d
18 at 400. Varian’s attorneys spent a total of 12.9 hours of attorney time preparing the instant
19 motion, with related fees amounting to \$5299. *See* Poppe Decl. at ¶¶8-9; Sneath Decl. at ¶¶6-7.

20 **III. CONCLUSION**

21 For the reasons set forth above, Varian respectfully requests this Court to grant the instant
22 motion and award contempt sanctions, including damages and attorneys’ fees.

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1 Dated: April 3, 2008

ORRICK, HERRINGTON & SUTCLIFFE LLP

2 By: /s/ Matthew H. Poppe

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2 **CERTIFICATE OF SERVICE**
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4 I hereby certify that a true and correct copy of the foregoing **VARIAN MEDICAL**
5 **SYSTEMS, INC.'S MOTION FOR CONTEMPT SANCTIONS** has been served upon
6 Plaintiff University of Pittsburgh, through counsel, via:

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 Facsimile
 First Class, US Mail, Postage Prepaid
 Certified Mail-Return Receipt Requested
 ECF Electronic Service
 Overnight Delivery
 E-mail

13 at the following addresses:

14 Rita E. Tautkus (by ECF)
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17 Dated: April 3, 2008

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 /s/ Matthew H. Poppe

 Matthew H. Poppe

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